IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 378.

KENNETH J. MULLANE, as Special Guardian and Attorney, etc.,

Appellant,

vs.

CENTRAL HANOVER BANK AND TRUST COMPANY, as Trustee, etc., *et al.*

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

BRIEF FOR APPELLEE, CENTRAL HANOVER BANK AND TRUST COMPANY.

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BRIEF FOR APPELLEE, CENTRAL HANOVER BANK AND TRUST COMPANY.

Opinions Below.

The opinion in the Surrogate's Court (R. 105) is reported in 75 N. Y. Supp. 2nd 397 (not officially reported).

The dissenting opinion of Mr. Justice Van Voorhis in the Appellate Division of the Supreme Court (R. 163) is reported in 274 App. Div. 772. All other justices voted to affirm, without opinion (R. 162).

The Court of Appeals unanimously affirmed without opinion (299 N. Y. 697).

Jurisdiction.

The jurisdiction of this Court rests on Title 28 United States Code, Section 1257; Act of June 25,

1948, Chapter 646, Section 39; 62 Stat. 992, conferring a right of appeal from a final judgment of the highest court of a state in which a decision could be had, where there is drawn into question the validity of a statute of the state on the ground of its being repugnant to the Constitution of the United States and the decision is in favor of its validity.

The Statute Involved.

The statute involved is subdivision 12 of Section 100-c of the Banking Law of the State of New York; Book 4, McKinney's Consolidated Laws of New York, pp. 142-143; Section 100-c (12); Chapter 687, Laws of 1937, Section 1, effective July 15, 1937 (renumbered from Banking Law Section 188-a to Section 100-c by Chapter 687, Laws of 1937, Section 2). The pertinent subdivisions of said Section 100-c are printed as an "appendix" to the brief of appellee, James N. Vaughan, herein.

Question Presented.

The question presented is whether due service of a notice pursuant to said subdivision 12 is sufficient to meet the requirements of "due process of law" under the Constitution of the United States so as to confer jurisdiction over persons interested in the income of a common trust fund in a proceeding for the judicial settlement of the accounts of the trustee of the common trust fund.

Statement of Case.

By said Section 100-c of the Banking Law, the New York legislature made statutory provision for "common trust funds". Such "common trust funds" are funds in which the assets of numerous small trusts may, subject to prescribed safeguards, be mingled in common investments. The legislative purpose was to make the services of corporate fiduciaries available to smaller trusts and estates and to enable them to obtain the advantages of diversification of risk and greater safety normally obtainable only by larger funds (R. 112). The experience in this State and in an increasing number of other states (31 in addition to New York), providing legislative authority for such funds (appellant's brief, pp. 105-106), is demonstrative of the desirability and usefulness of common trust funds.

On January 31, 1946, appellee Central Hanover Bank and Trust Company established its Discretionary Common Trust Fund No. 1 and thereafter duly conducted the same according to the "Plan of Operation" (R. 80-98), said Section 100-c and the Regulations of the New York Banking Board (R. 60-79) and of the Federal Reserve Board (R. 15).

On March 28, 1947, the appellee trust company filed its first account of proceedings in the Surrogate's Court, New York County, and thereafter caused a notice to be published in due compliance with said subdivision 12 of Section 100-c (R. 24-32, 33). No other service was required by said Section 100-c or was made. Pursuant to said subdivision 12, appellant Kenneth J. Mullane and appellee James N. Vaughan were duly appointed special guardians and attorneys for persons interested in the income and principal, re-

spectively, of such common trust fund who should fail to appear in their own behalf (R. 105-106).

By preliminary report and answer, appellant appeared specially and interposed objections to the jurisdiction of the court (R. 34-35). These objections were overruled by intermediate decree of the Surrogate's Court, dated November 26, 1947 (R. 4-14), affirmed (one Justice dissenting) by order of the Appellate Division, dated June 21, 1948 (R. 129-130). Appellant then filed his final report, but without prejudice to such objections (R. 148, 149-156). The same objections were again overruled by final decree of the Surrogate's Court, dated August 12, 1948 (R. 175-190), affirmed (one Justice dissenting) by the Appellate Division of the Supreme Court (R. 212-213) and unanimously affirmed by the Court of Appeals (299 N. Y. 697). These objections included the following:

> "That the provisions contained in Section 100-c of the Banking Law for notice of application for judicial settlement are insufficient to meet the requirements of 'due process of law' under the * * * federal * * * constitution * * *, and that the notice given herein is inadequate to confer jurisdiction herein upon this Court * * *" (R. 35, 156).

This constitutional question is necessarily involved in the decision herein and was squarely passed upon by all courts, including the highest court of the State of New York.

The statutory provisions of said subdivision 12 respecting notice are printed at pages 101-102 of the Record herein. The constitutional sufficiency of the

notice is to be judged in the light of the following statutory safeguards and factual background.

Subdivision 9 of Section 100-c requires that, at the time of first investment in the common fund by each participating trust, the trust company shall give notice by mail of such investment to each person of full age and sound mind, whose name and address is then known to it and who is "then entitled to share in the income therefrom" and to each such person "who would be entitled to share in the principal if the event upon which such estate, trust or fund will become distributable should have occurred at the time of sending such notice" and that there be "included in or appended to such notice a copy of the provisions of this section in respect of * * * the judicial settlement of the accounts of such trust company for such common trust fund" (see form of notice printed at R. 98-104). Such persons are, therefore, informed at the outset, by full and verbatim copies of subdivisions 9 to 15, both inclusive, of Section 100-c, not only as to the time of such judicial accountings ("not less than twelve nor more than fifteen months after the date on which a common trust fund is established and triennially thereafter"), and the place of such accountings (the "supreme court" or the "surrogate's court" "in the county in which such trust company maintains its principal office"), but also as to the precise manner in which notice of the accountings is to be given (by publishing "not less than once in each week for four successive weeks in a newspaper to be designated by the court a notice or citation addressed generally without naming them to all parties interested in such common trust fund").

Additional statutory safeguards are prescribed. The common trust fund is operated pursuant to the

Regulations of the State Banking Board and Regulation "F" of the Federal Reserve Board (R. 14-15). Broad powers of supervision are conferred upon the Banking Board (Banking Law, Section 14, 1 (e)). A copy of the rules and regulations must be furnished to each County Clerk and to each Surrogate (R. 113). The Plan of Operation must be approved by the Banking Board and kept available for inspection by, and furnished upon request to, any person interested (R. 60-61). The Board of Trustees of the trust company must appoint a Trust Investment Committee and administrative officers who must perform specified duties and keep specified records (R. 62-64). The investments of the common fund must be kept separate and apart from the investments of the trust company (Section 100-c, subdivision 4). The trust company may not purchase for the common fund any securities from itself or from any affiliate (Section 100-c, subdivision 4). No investment may be made in the securities of any organization engaged principally in the issue, sale or distribution of securities (Section 100-c, subdivision 4). There must be an audit at least annually "by auditors responsible only to the board of directors of the trust company" (R. 73). The trust company must "without charge, send a copy of the latest report of such audit annually to each person to whom a regular periodic accounting of the estates, trusts or funds participating in the common trust fund ordinarily would be rendered" or must "send advice to each such person * * * that a copy will be furnished without charge upon request" (R. 73). The common fund must be valued as of specified dates and in a specified manner (R. 65-67). Admissions and withdrawals may be made only as of valuation dates and

after specified notice (R. 67-69). All accountings, records, statements and audits must be kept open for inspection at prescribed periods (R. 74). Accountings must be rendered to the court and a copy furnished to the Superintendent of Banks triennially (Section 100-c, subdivision 10). The court must appoint "a competent and responsible" person as special guardian and attorney to represent persons interested in income and another such person to represent persons interested in principal, who do not appear on their own behalf (Section 100-c, subdivision 12). In addition to all this, the operations of the funds are scrutinized by the Bank Examiners in their recurrent, frequent and unannounced examinations of the trust company.

The accountings for the common fund adjudicate only the propriety of the investments and other proceedings within the common fund (R. 112). They do not adjudicate the propriety of the placing of the funds of a participating trust in the common fund, the investment of other funds, if any, of the participating trust or other proceedings within the participating trust (R. 112). Accordingly, the prescribed triennial judicial accountings for the common fund do not eliminate the accountings and like proceedings normally required in respect of the participating trusts (R. 112). Unless kept to a minimum, the aggregate of the recurrent additional expense for the triennial common fund accountings would impose a burden destructive of the purposes of the common fund (R. 112-113).

The success of a common fund depends upon its use by large numbers of small estates and trusts so as to spread the additional expense (R. 112-113). The size of the participating trusts may be judged

by the fact that the statute first limited participation by any single trust to $25,000 (Ch. 687, Laws 1937), later raised to $50,000 (Ch. 602, Laws 1943). The instant fund, while relatively new and growing (R. 41), had, at the inception of this proceeding, gross capital of almost $3,000,000 with 113 participating trusts (R. 106). The gross capital is not limited by statute but will be determined by the practicalities of experience and efficiency (R. 48, 117). A common fund administered by The Bank of New York approximated $6,250,000 with 225 participating trusts, while in Pennsylvania funds have reached the amount of $32,000,000 with 1,607 participating trusts (R. 54).

In the instant case, the number of known persons entitled to notice of the first investment were approximately 315 (R. 117). This includes only the then current income beneficiaries and the then presumptive remaindermen—*i. e.*, those who would receive principal in case of the immediate termination of the trust. It excludes beneficiaries of trusts which have invested in the common fund since the filing of the petition. It excludes all beneficiaries who have subsequent life estates or who have contingent remainders to take effect in case the presumptive remaindermen die or other divesting events occur prior to the time of distribution—a group vastly greater in number, whose identities and addresses are frequently unknown to the trustee and are constantly changing due to deaths, births or other contingencies unknown to the trustee—as, for example, when, upon the death of secondary income beneficiaries or contingent remaindermen their future interests pass to a whole group of substituted beneficiaries, such as brothers and sisters and their issue (R. 43-44, 53). No estimate exists in the case of the instant fund as to the

number in this latter group of beneficiaries, but in the case of The Bank of New York fund, itself still a small fund, the number is estimated as up to 5,000 (R. 50, 54).

In accountings respecting a single individual trust, the ascertainment of the names and addresses of the beneficiaries not infrequently involves months of delay, hiring of investigators and substantial expense (R. 39, 40-41, 47). Supplemental citations to correct lack of or error in information or to bring in after-born parties or representatives of deceased parties are frequently required (R. 39, 117). In other cases, a preliminary judicial construction is required in order to determine those interested, as for example, whether a donor's "heirs" are to be determined under a particular instrument as of the date of the donor's death or as of the date of distribution (R. 50-51, 117). There are occasions when a complete impasse exists for an extended period, as in the case where the outcome of a Will contest is required to determine whether a power of appointment has been effectively exercised (R. 50-51, 117).

In the case of the multiple trusts in a common fund, the aggregate of the recurrent triennial expense of attempting to ascertain the current names and addresses of all beneficiaries would be prohibitive and indeed, where those interested run into the thousands, the practical certainty of births, deaths or the occurrence of other contingencies during the period of investigation would render the information obtained at the outset unreliable, so that the assembling of complete and accurate information as of a given date would be virtually impossible (R. 53, 58-59). Even an endeavor to follow and check again and again before each triennial accounting the names, addresses

and competency of the income beneficiaries and presumptive remaindermen would involve "disproportionate expense" (R. 41-44, 46-51, 58-59, 117).

The reasonableness of the notice prescribed by the statute in the light of the practicalities of the situation was fully considered by the drafting committee in framing the statute and the enactment, therefore, constitutes a legislative determination that the notice is reasonable and as well devised to inform as is possible without destructive difficulties, delay and expense (R. 58, 113). The Surrogate's opinion is explicit as to his finding of fact in this regard (R. 117-118, 120) and such finding is necessary to and implicit in the determination of the Appellate Division (with only one justice out of five dissenting) and the determination unanimously joined in by all seven judges of the Court of Appeals.

Appellant's brief contains a number of statements which we believe to be irrelevant or inadvertently incorrect or misleading. For instance, appellant commences his discussion of common trust funds with the statement that "Section 100-c Imposes Conflicting Loyalties Upon the Trust Company" (appellant's brief, pp. 8-10, 38), the explanation being that the trustee must at the same time be loyal to the common trust fund and to the participating trusts. Not only do we believe this irrelevant to the only real issue in this case—viz., the sufficiency of the statutory notice of accountings—but, as a matter of fact, the common fund consists exclusively of funds invested by the participating trusts. The trust company cannot have any investment in the common fund in its individual capacity (R. 74) and "self-dealing" between the trust company in its capacity as trustee

and in its individual capacity is specifically prohibited (this brief, pp. 6-7). The operations of the fund enure directly to the participating trusts—and to them alone. The trust company receives no compensation for administering the common fund beyond its normal commissions in the participating trusts (R. 74). Thus, the interests and loyalties of the trust company as common fund trustee and as trustee of the participating trusts are alike and the trust company has no incentive other than the successful operation of the common fund for the benefit of the participating trusts. As to any risk of unlawful "self-dealing", the statutory safeguards (this brief, pp. 5-7), including the required audits at least annually by independent "auditors responsible only to the board of directors" and the recurrent scrutiny of bank examiners—to say nothing of the triennial investigations of special guardians and attorneys, specially appointed, as appellant and Mr. Vaughan in this case—furnish protections in the case of the common fund far beyond anything incident to the normal administration of an individual trust. Moreover, while appellant's assumption of a principal loss of 60% in the common fund (brief, pp. 26 and 31) may possibly be justified for purposes of illustrating his argument, it takes some liberties with the actual facts of this case—viz: gross realized losses of only $466.05 in a fund of almost $3,000,000 (R. 33). Appellant (brief, p. 9) states that individual beneficiaries are "powerless to prevent an investment" in the common fund. They are no more powerless to prevent such an investment than to prevent any other authorized investment, nor is their remedy any less if the investment is, in fact, unauthorized. As appellant himself points out (brief, p. 31), the common fund accounting relates only to transactions

within the common fund and the propriety of an investment therein by an individual trust, like the propriety of any other investment of the individual trust, remains subject to challenge and determination in a subsequent accounting for the individual trust (*Matter of Bank of New York*, 189 Misc. (N. Y.) 459; *Matter of Hoagland*, 74 N. Y. Supp. 2d 156—not officially reported—affd. 272 App. Div. 1040 and 297 N. Y. 920). Appellant (brief, pp. 44-45) goes outside the printed record to discuss the "physical make-up and appearance" of the notice as published in the "New York Law Journal". He omits reference to the official and mandatory rule, dated January 24, 1938, made by the Justices of the Appellate Division of the Supreme Court, First Judicial Department, pursuant to the provisions of subdivision 1 of Section 97 of the Judiciary Law (quoted on Editorial Page, the "New York Law Journal"—not officially reported), which designated the "New York Law Journal"

> ". . . as the paper in which shall hereafter be published . . . every notice and advertisement of judicial proceedings which shall be required to be published in one or more papers in the First Judicial Department"

* * * *

and

> ". . . as a newspaper having a circulation calculated to give public notice of legal publications in the First Judicial Department".

Appellant again goes outside the record to assume that the lack of appearances by beneficiaries in "five separate legal proceedings involving over 2,000 persons" is demonstrative of inadequacy of the notice of the proceedings (brief, p. 45). In view of the actual

knowledge of the investment conferred upon a large number of the beneficiaries by the notice of first investment and by copies of the annual audit, it is submitted that, on the contrary, any such complete lack of appearances could connote only satisfaction with the administration of the funds. Appellant repeatedly and persistently states, as the real issue in this case, the adequacy of the statutory notice in a proceeding "which destroys rights *in personam*" (appellant's brief, pp. 12, 14, 15, 16, 18-23, 26-27, 29-30, 34, 36-37, 39, 48, 58-67). This statement not only begs the issue; it is clearly incorrect under the familiar principles and precedents governing trust accountings, discussed at the outset of Point I of this brief. It would be impossible and inappropriate within the compass of a reasonably condensed brief to answer each statement believed erroneous in appellant's 110 page brief. We have, therefore, except for this brief introductory statement, restricted the following discussion to the points which, to us, appear of controlling significance.

Summary of Argument.

The notice prescribed by the statute fully complies with "due process of law".

(a) The proceeding is "*in rem*" and, therefore,

(1) Personal service may be dispensed with;

(2) No set form of notice is prescribed by constitutional mandate, but it "belongs to the legislature to determine in the particular instance . . . what manner of constructive notice shall be sufficient to reasonably apprise the party proceeded against

of the legal steps which are taken against him" and the question being "one of local experience . . . this court ought to be very slow to declare that the state legislature was wrong in its facts or abused its discretion".

(b) The statutory notice is not only "reasonable", but goes far beyond such notice as posting on the court house door or the like, confirmed by familiar practice and precedent as sufficient in such related proceedings *in rem* as proof of wills "in the common form" and accountings and distributions in decedents' estates.

POINT I.

The notice prescribed by the statute fully complies with the requirements of "due process of law".

(a) The proceeding is *in rem* and, therefore,

(1) Personal service may be dispensed with.

Both the common fund, by the statute governing its existence (Banking Law Section 100-c, subdivision 10), and the trustee, by its voluntary petition (R. 14 *et seq.*), are subject to the jurisdiction of the court. It cannot be doubted that a trust accounting proceeding is a proceeding *in rem*—to use the classic phrase, it determines "the state and condition" of the account—or that where, as here, the court has jurisdiction over both the trustee and the fund itself, the court has jurisdiction to settle the trustee's accounts and to exonerate the trustee from liability for the acts accounted for—a major purpose of and incident to an accounting proceeding—without personal service upon

the beneficiaries (*Matter of Buckman*, 270 App. Div. (N. Y.) 707 (affd. 296 N. Y. 915; cert. denied 332 U. S. 763); *Devlin* v. *Rousell*, 36 App. Div. (N. Y.) 87; *In re Fogel's Estate*, 176 Misc. (N. Y.) 368; *Henricksen* v. *Baker-Boyer National Bank*, 139 Fed. 2d 877 (C. C. A. 9)).

This is demonstrated by the historic and day to day function of the courts in granting such relief. It is in effect conceded by appellant in his explicit disavowal of any contention that personal service is required. At page 13 of his brief he says:

> "*No claim is, or ever has been, made by us that, in the present situation, the requirements of due process necessitate the personal service of a citation upon any, or all, of the persons interested in income of the common fund and of the underlying estates, trusts or funds.*" (Italics in original.)

Such rule is essential to the administration of trusts and estates. Otherwise the determination of questions of construction and administration, essential to the operation of a trust, would frequently be impossible, where beneficiaries are or may at any moment become non-residents of the state and even of the country.

No relief beyond such judicial settlement is involved herein. No judgment imposing a "personal liability or obligation" upon any beneficiary, whether or not represented by appellant, is sought.

This should, we believe, dispose, without more, of appellant's arguments that the trustee's duty to account for any wrongful act, to respond in damages for "negligence or bad faith" or to "redress a breach

of trust" involve "rights *in personam.*" Concededly, the liability of a trustee to surcharge involves a liability "*in personam.*" But the trustee has voluntarily subjected itself personally to the jurisdiction of the court. So far as the correlative rights are concerned, they, like any other rights of the trust against any person—such as the right to enforce claims against or recover damages from third parties—are assets of the fund itself and, as such, are within the jurisdiction of the court. This is demonstrated by the familiar fact that a decree surcharging a trustee ordinarily directs the return to the *fund* of the amount of the surcharge (see for example, Bradford Butler, New York Surrogate Law and Practice (1941), Vol. 4, § 2838 and cases cited immediately below). It is further demonstrated by the fact that a beneficiary's attorney who brings about such a surcharge is awarded compensation from the fund itself on the ground that he has benefited the *fund*, notwithstanding the clear rule that in other circumstances a beneficiary in an accounting proceeding must bear the expenses of his own attorney (*Matter of Chaves*, 143 Misc. (N. Y.) 872; *Matter of Hirsch*, 154 Misc. (N. Y.) 736; *Matter of Vorndran*, 132 Misc. (N. Y.) 611).

Assuredly, the fact that the rights of persons against another person *in respect of a res* are affected by a proceeding does not render the proceeding *in personam*. Rights *in rem* have no existence apart from the persons who own them. Whether the proceeding be to determine the "state and condition" of an account or to adjudicate title to land or to a chattel or to a chose in action, the very purpose is to adjudicate *rights as between claimants to the res* as distinguished from the *imposition of a personal obligation or li-*

ability enforceable against a respondent's property generally. This is the familiar distinction between *Pennoyer* v. *Neff*, 95 U. S. 714, invalidating an attempt to obtain a *personal judgment* against a defendant without personal service of process and such proceedings *in rem* as escheat, confiscation, forfeiture, condemnation or registry of titles where claims of others to recover property from the person, whose title is confirmed in the proceeding, may be barred, or such proceedings *in rem* as attachment or garnishment of debts or choses in action, where the right of a creditor against the debtor, whose debt is attached, may be likewise barred—without personal service of process (see quotations from *Security Savings Bank* v. *California*, 263 U. S. 282 and *Matter of Empire City Bank*, 18 N. Y. 199, and citations therein, *infra*, pp. 24-27, 27-29; also *Herbert* v. *Bicknell*, 233 U. S. 70).

The basic distinction between a decree acting *in rem* with respect to a fund and a decree imposing personal liability is illustrated by *Michigan Trust Co.* v. *Ferry* (appellant's brief, p. 74). In this case Sanborn, Circuit Judge, said at 175 Fed. 667, 674:

> "It is one thing, however, to adjudge the true state of the account of the assets of an estate in the hands of an executor * * * and a very different thing to adjudge that the person who holds the office of executor has taken assets of the estate from himself as executor, has committed a devastavit, and is personally liable in damages therefor in a specific amount, and to require him to pay that amount out of his individual property. The former is a determination of the true state of the account of the assets of the estate between the executor and the estate; the latter is the ad-

judication of the liability of a person and of his individual property for a tort, or, if the tort be waived, for a debt. The former was within the scope of the jurisdiction of the Michigan probate court because it was a determination, after due notice of its proposed action, of the state of the *res* that was the subject of the proceeding before it; the latter was the adjudication of a challenged cause of action *in personam* at common law."

While this Court (228 U. S. 346) reversed the decision below, it did not question the holding respecting jurisdiction *in rem*, but held that, under Michigan law, the Michigan court retained continuing jurisdiction *in personam* over the non-resident executor as well as jurisdiction *in rem* over the fund.

Familiar situations, analogous to a trust accounting in that personal rights and relationships rather than a tangible "*res*" may be affected, notwithstanding the lack of personal service, present themselves: the settled right of the courts of the state of domicile to construe a will (*Smith* v. *Central Trust Co.*, 12 App. Div. 278, affd. without opinion 154 N. Y. 333; *Henricksen* v. *Baker-Boyer National Bank*, 139 Fed. 2d 877), but not to enter a money judgment against a respondent (*Matter of Buckman*, 270 App. Div. 707, affd. 296 N. Y. 915, cert. denied 332 U. S. 763); the settled right of the state of incorporation to make a determination, entitled to full faith and credit in all states, respecting the liability of all stockholders to assessment, but not to enter an affirmative money judgment against an individual stockholder for the amount of the assessment (*Shipman* v. *Treadwell*, 208 N. Y. 404, 410; *Converse* v. *Hamilton*, 224 U. S. 243; *Broderick* v. *Rosner*, 294

U. S. 629, 644); the settled right of the state of genuine marital domicile to adjudicate marital rights of husband and wife, but not to enter a money decree for alimony (*Jackson* v. *Jackson*, 290 N. Y. 512).

We believe it unnecessary, therefore, to enlarge further upon appellant's lengthy discussion as to whether certain obligations of the trustee may be considered for other purposes or in other contexts as "*in personam*".

(2) The proceeding being *in rem*, no set form of notice is prescribed by constitutional mandate, but it "belongs to the legislature to determine in the particular instance . . . what manner of constructive notice shall be sufficient to reasonably apprise the party proceeded against of the legal steps which are taken against him" and the question being "one of local experience . . . this court ought to be very slow to declare that the state legislature was wrong in its facts or abused its discretion".

Mr. Justice Holmes has gone to the root of this problem with his clarity and insight into constitutional questions and the common law in the case of *Tyler* v. *Judges of the Court of Registration*, 175 Mass. 71, 55 N. E. 812. This was a case for registration of title to land. No personal service on either residents or non-residents was required. In the course of his opinion Mr. Justice Holmes said:

> "Prescription or a statute of limitations may give a title good against the world and destroy all manner of outstanding claims, without any notice or judicial proceeding at all. Time, and the chance which it gives the owner to find out that he is in danger of losing rights, are due process of law in that case. *Wheeler* v. *Jackson*, 137 U. S. 245, 258, 11 Sup. Ct. 76, 34 L. Ed. 659. The same result used to follow upon proceedings which, looked at apart from history, may be re-

garded as standing halfway between statutes of limitations and true judgments *in rem*, and which took much less trouble about giving notice than the statute before us. We refer to the effect of a judgment on a writ of right after the mise joined and the lapse of a year and a day (Booth, Real Act. 101, in margin Fitzh. Abr. 'Continual Claim,' pl. 7; Faux, Recovere, pl. 1; Y. B. 5 Edw. III. 51, pl. 60); and of a fine, with proclamations after the same time, or by a later statute after five years (2 Bl. Comm. 354; 2 Inst. 510, 518, St. 18 Edw. I., 'Modus Levandi Fines'; St. 34 Edw. III. c. 16; St. 4 Hen. VII. c. 24; St. 32 Hen. VIII. c. 36). It would have astonished John Adams to be told that the framers of our constitution had put an end to the possibility of these ancient institutions. * * * In *Hamilton* v. *Brown*, 161 U. S. 256, 16 Sup. Ct. 585, 40 L. Ed. 691, a judgment of escheat was held conclusive upon persons notified only by advertisement, to all persons interested. * * * So, a decree allowing or disallowing a will binds everybody, although the only notice of the proceedings given be a general notice to all persons interested. *And in this case, as in that of escheat, just cited, the conclusive effect of the decree is not put upon the ground that the state has an absolute power to determine the persons to whom a man's property shall go at his death, but upon the characteristics of a proceeding in rem.* *Bonnemort* v. *Gill*, 167 Mass. 338, 340, 45 N. E. 768. See 161 U. S. 263, 274, 16 Sup. Ct. 585, 49 L. Ed. 691. Admiralty proceedings need only to be mentioned in this connection, and further citation of cases seems unnecessary" (pp. 73-75). (Italics supplied.)

The practice and precedents, regarding notice of probate "in the common form", by posting on the court house door or by advertisement generally to persons interested, without naming them, are too familiar to call for extended comment. See *Bonnemort* v. *Gill*, cited in *Tyler* v. *Judges of the Court of Registration* (*supra*) and the cases cited in the following quotation from *Matter of Horton*, 217 N. Y. 363.

In *Matter of Horton*, an Ohio probate was held conclusive as to property situate, and as to the decedent's heirs-at-law resident, in New York, although the Ohio statute required no notice whatever to non-residents and provided merely that the probate was subject to contest upon objections filed within two years. The court said:

> "* * * the question is presented whether a proceeding to probate a will is one which requires service of process upon all parties interested, even though non-residents, or is one in the nature of a proceeding *in rem* where such service may be dispensed with.
>
> "We regard it as well established that the latter is the case and that if the Probate Court otherwise has jurisdiction it may make a decree admitting a will to probate which is binding upon non-residents even though notice has been dispensed with on the original probate, and such probate becomes conclusive in the absence of contest within a given period as provided by the laws of Ohio now before us. (*Vanderpool* v. *Van Valkenburgh*, 6 N. Y. 190, 198; *Matter of Law*, 56 App. Div. 454, 458; *Matter of Goldsticker*, 192 N. Y. 35, 39; *Woodruff* v. *Taylor*, 20 Vt. 65, 73; *Crippen* v. *Dexter*, 13 Gray (Mass.), 330; *Bonne-*

mart v. *Gill*, 167 Mass. 338, 340; *Robertson* v. *Pickrell*, 109 U. S. 608; *Overby* v. *Gordon*, 177 U. S. 214; *Tilt* v. *Kelsey*, 207 U. S. 43; *Christianson* v. *King Co.*, 239 U. S. 356)" (pp. 367-368).

In *Woodruff* v. *Taylor*, 20 Vermont 65, the court said:

> "The probate of a will I conceive to be a familiar instance of a proceeding *in rem* in this state. The proceeding is, in form and substance, upon the will itself. No process is issued against any one; but all persons interested in determining the state, or condition, of the instrument are constructively notified, by a newspaper publication, to appear and contest the probate; and the judgment is, not that this or that person shall pay a sum of money, or do any particular act, but that the instrument is, or is not, the will of the testator. It determines the status of the subject-matter of the proceeding. The judgment is upon the thing itself; and when the proper steps required by law are taken, the judgment is conclusive * * *" (p. 73).

Similar practice and precedents govern accountings, construction proceedings and distributions in decedent's estates, which adjudicate and affect property rights and interests of beneficiaries after they have vested under local law as the result of probate. See for example: *Goodrich* v. *Ferris*, 214 U. S. 71; *Christianson* v. *King County*, 239 U. S. 356; *Henricksen* v. *Baker-Boyer National Bank*, 139 Fed. 2d 877; *Roseman* v. *Fidelity & Deposit Co. of Md.*, 154 Misc. (N. Y.) 320; *Donnell* v. *Goss*, 269 Mass. 214.

Goodrich v. *Ferris, supra,* involved the settlement of an executor's account and the distribution of the estate. The statute provided for ten days' notice by posting in at least three public places in the county or by publication. The court was authorized to direct further notice, but failed to do so. The notice was held constitutionally sufficient as against a New York heir, who received no actual notice, the court saying:

> "The distribution of the estate of Williams was but an incident of the proceeding prescribed by the laws of California in respect to the administration of an estate in the custody of one of its probate courts. Under such circumstances, therefore, and putting aside the question of whether or not the State of California did or did not possess arbitrary power in respect to the character and length of notice to be given of the various steps in the administration of an estate in the custody of one of its courts, we hold that the claim that ten days' statutory notice of the time appointed for the settlement of the final account of the executor and for action upon the petition for final distribution of the Williams estate was so unreasonable as to be wanting in due process of law, was clearly unsubstantial and devoid of merit, and furnished no support for the contention that rights under the Constitution of the United States had been violated. As held in *Bellingham Bay Co.* v. *New Whatcom,* 172 U. S. 314, 318, even although the power of a state legislature to prescribe length of notice is not absolute, yet it is certain 'that only in a clear case will a notice authorized by the legislature be set aside as wholly ineffectual on account of the shortness of the time'." (p. 81).

The contention to the contrary was held "so wanting in merit as to cause it to be frivolous or without any support whatever in reason" (p. 81).

In *Christianson* v. *King County*, 239 U. S. 356, an heir of a decedent challenged a legislative provision for notice by publication for four weeks in local newspapers in the case of a statutory provision for the escheat of lands due to failure of heirs to appear in an accounting proceeding. The court said:

> "The statutory notice * * * was published and on the return day the proceeding was duly continued and, on hearing, the decree was entered settling the account, finding there were no heirs. * * * this proceeding was essentially *in rem* * * *. It is apparent that there was no deprivation of property without due process of law" (p. 373).

Similar practice and precedents govern proceedings *in rem* relating to a whole host of *inter vivos* transactions and proceedings, which are in no way connected with decedents' estates and which affect a *res* that may be either tangible or intangible—such as admiralty, escheat, condemnation, confiscation, forfeiture, registration of titles, attachment or garnishment, stockholders' liability, Alien Property Custodian proceedings, unclaimed bank deposit proceedings and the like. Rather than labor the point, we refer to only a few cases which declare the applicable principles.

In *Campbell* v. *Evans*, 45 N. Y. 356, confiscation by seizure and sale of animals running at large upon the highways upon notice given "by posting a copy

thereof in six public and conspicuous places in the town" was upheld. The court did not discuss or base its decision upon what it might have independently concluded to be the "best available" notice or the relative merits of other methods of notice, as for example personal service or mailing if the owner were known, or publication, if unknown. On the contrary, the court held:

> "The subject matter of the act was within the general powers vested in the legislature to pass such acts as, in their judgment, will conduce to the welfare of the citizens and the public good; and in its general scope and terms, its purpose and object, it is not repugnant to or forbidden by the Constitution" (p. 358).
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> * * * *
>
> "The owner may or may not be known; * * *. In analogy to proceedings in other cases *in rem* * * * the legislature has provided for notice, in such form and for such length of time as they thought reasonable, and best calculated to inform the owner of the proceedings, and give him an opportunity to be heard; and the mode and manner of giving the notice is neither untenable or illusory * * *" (p. 359).

In *Security Savings Bank* v. *California*, 263 U. S. 282, it was contended that a statutory provision for service by publication, without other notice of any sort, in a suit by the state to obtain unclaimed bank deposits was unconstitutional because it was not shown that personal service was impossible or impractical. The court overruled the contention, pointing out that,

although such a showing is common requirement, it is not constitutionally indispensable, saying:

> "The proceeding is not one *in personam*—at least, not so far as concerns the depositor. The State does not seek to enforce any claim against him. It seeks to have the deposit transferred. The suit determines the custody (and perhaps the ownership) of the deposit. The state court likened the proceeding to garnishment, and thought that it should be described as *quasi in rem.* In form it resembles garnishment. In substance it is like proceedings in escheat, *Hamilton* v. *Brown,* 161 U. S. 256, 263; *Christianson* v. *King County,* 239 U. S. 356, 373; for confiscation, *The Confiscation Cases,* 20 Wall. 92, 104; for forfeiture, *Friedenstein* v. *United States,* 125 U. S. 224, 230, 231; for condemnation, *Huling* v. *Kaw Valley Ry., etc., Co.,* 130 U. S. 559; for registry of titles, *American Land Co.* v. *Zeiss,* 219 U. S. 47; and libels for possession brought by the Alien Property Custodian, *Central Union Trust Co.* v. *Garvan,* 254 U. S. 554. These are generally considered proceedings strictly *in rem.* But whether the proceeding should be described as being *in rem* or as being *quasi in rem* is not of legal significance in this connection. In either case the essentials of jurisdiction over the deposits are that there be seizure of the *res* at the commencement of the suit; and reasonable notice and opportunity to be heard" (pp. 286-287).

* * * * *

> "The legislature evidently assumed that it would be impossible to serve such depositors personally. The Supreme Court of the State held that the

> legislature was warranted in this assumption. The owners of the deposits were, therefore, treated like persons unknown * * *. We cannot say that the view entertained by the legislature and the state courts was so unreasonable as to constitute a denial of due process" (p. 289).

The court further overruled the objection that the publication was not reasonable notice because made in Sacramento County instead of the county in which the bank was located, saying:

> "The highest court of the State deemed the prescribed publication in Sacramento County reasonable notice. We have no ground for saying that it was not. Obviously the question 'is one of local experience on which this court ought to be very slow to declare that the state legislature was wrong in its facts' or abused its discretion. *Patsone* v. *Pennsylvania*, 232 U. S. 138, 144; *Adams* v. *Milwaukee*, 228 U. S. 572, 583" (p. 290).

In *Matter of Empire City Bank*, 18 N. Y. 199, notice by publication, except as to residents of the county, was upheld as sufficient in a proceeding to enforce the liability of stockholders of an insolvent bank. Here certainly the names and record addresses of the stockholders were known and notice by mail or even in person would have been far more practicable than in the present case. But here again the court deliberately refrained from an attempt to substitute its judgment for that of the legislature on a matter of local practice and policy. This case has so frequently been cited as to have become a leading case. Accordingly, the opinion is quoted at some length:

> "We have not been referred to any adjudica-

tions, holding that no man's right of property can be affected by a judicial proceeding unless he have personal notice. It may be admitted that a statute which should authorize any debt or damages to be adjudged against a person upon a purely *ex parte* proceeding, without a pretence of notice or any provision for defending, would be a violation of the constitution and be void; but where the legislature has prescribed a kind of notice by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him, and an opportunity is afforded him to defend, I am of opinion that the courts have not the power to pronounce the proceeding illegal. The legislature has uniformly acted upon that understanding of the constitution. Thus, attachments are allowed against parties represented to be absent, absconding or concealed debtors, and the proceeding results in the sale of ~~their~~ property and the appropriation of its avails to the benefit of the alleged creditors; and the only notice required is a publication in certain newspapers (2 R. S., 3; §§ 1, 28). So in justices' courts, attachments are authorized against persons who have departed or are about to depart from the county, or who keep concealed, with a certain intent; and the notice required is the leaving the attachment at the last place of residence of the party, if such place exists, or if not, with the person in whose possession the goods may be found (2 R. S. 230; §§ 26, 31). There are many other examples of the same kind, such as foreclosing mortgages by advertisement; discharging an insolvent debtor upon the petition of a portion of his creditors, those not petition-

ing being notified of the proceeding only by advertisement in the newspapers. *Various prudential regulations are made with respect to these remedies; but it may possibly happen, notwithstanding all these precautions, that a citizen who owes nothing, and has done none of the acts mentioned in the statutes, may be deprived of his estate without any actual knowledge of the process by which it has been taken from him. If we hold, as we must, in order to sustain this legislation, that the constitution does not positively require personal notice in order to constitute a legal proceeding due process of law, it then belongs to the legislature to determine in the particular instance whether the case calls for this kind of exceptional legislation, and what manner of constructive notice shall be sufficient to reasonably apprise the party proceeded against of the legal steps which are taken against him*" (pp. 215-216).

In *American Land Co. v. Zeiss*, 219 U. S. 47, the court held that service by publication upon persons claiming an interest in property, as prescribed by California statute, in a proceeding to quiet title to realty was constitutionally sufficient, saying (pp. 66, 67):

"To argue that the provisions of the statute are repugnant to the due process clause because a case may be conceived where rights in and to property would be adversely affected without notice being actually conveyed by the proceedings is in effect to deny the power of the State to deal with the subject. The criterion is not the possibility of conceivable injury but the just and reasonable character of the requirements, having

reference to the subject with which the statute deals. The doctrine on this subject was clearly expressed by the Court of Appeals of New York in *In re Empire City Bank*, 18 N. Y. 199, 215, where, speaking of the right of a State to prescribe in a suitable case for constructive service, it was said:" (The court here quoted the portion of the opinion from such case printed in italics on p. 29 of this brief.)

As demonstrated by the foregoing cases and citations, the legislature, where personal service may be dispensed with, has wide latitude in prescribing the form of notice and this Court has been properly reluctant to override the judgment of the local legislature on matters of local policy and practicality.

Appellant endeavors to distinguish various of the cases cited above or in the Surrogate's opinion as falling into certain categories, each claimed to be inapplicable to the present case. He fails to discern or to reveal that each category is but an example of the underlying rule that in a proceeding "*in rem*" or "*quasi in rem*" no set form of notice is required but that the form of notice is dependent upon the practicalities of a given case as determined by the legislature in the exercise of a broad discretion. Thus, appellant dismisses the cases relating to probate, distribution and accountings in decedents' estates upon the ground that "there is no federal constitutional guarantee of the preservation of the expectancy of succession to property of a decedent, whether by intestacy or by testament" (brief, pp. 74 and 85), while the courts, on the contrary, have squarely based the decisions on the "characteristics of a proceeding *in rem*" (see explicit statement of Mr. Justice Holmes to this effect

in *Tyler* v. *Judges of the Court of Registration, supra*, p. 20 and quotations from cases cited *supra*, pp. 21-24). Thus, appellant dismisses another group of cases as irrelevant on the ground that they concern some "government power" such as taxation, condemnation, registration of title to or other proceedings affecting land (brief, pp. 80 *et seq.*), whereas the courts based the decisions upon the characteristics of an action *in rem*. For instance in *Ballard* v. *Hunter*, 204 U. S. 241, referred to in appellant's brief (pp. 80, 82), the court actually based its decision on the ground that

> "The law must be framed and judged for the consideration of the practical affairs of men. The law cannot give personal notice of its provisions or proceedings to everyone" (p. 262).

In *Case of Broderick's Will*, 88 U. S. 503, this Court said:

> "The world must move on, and those who claim an interest in persons or things must be charged with the knowledge of their status and condition and of the vicissitudes to which they are subject. *This is the foundation of all judicial proceedings in rem*" (p. 519). (Italics supplied.)

This case was decided prior to the adoption of the 14th Amendment, but its holding has been frequently cited as applicable with respect to "due process" under the amendment.

It is believed to be unnecessary, and impossible within the compass of a reasonable "brief", to discuss all the cases referred to by appellant seriatim and at length. It will be apparent from a reading of each that the dispensing with the requirement of personal notice to all parties interested was predicated not

upon the particular "*res*" involved but upon the general characteristics of an action *in rem*.

While appellant cites and quotes excerpts from the opinions in certain cases which would appear to impose requirements as to notice more rigorous than those imposed in the cases discussed above, it will be found upon inspection that many of appellant's cases relate to proceedings *in personam* and not *in rem*, where wholly different principles apply. Other cases are clearly distinguishable upon their facts. Thus, *Griffin* v. *Griffin*, 237 U. S. 220 (appellant's brief, pp. 35, 55, 56, 65, 76 and 87) related to a money decree for alimony which, as the opinion expressly recognized, involved relief "*in personam*" (opinion, p. 228). *McDonald* v. *Mabee*, 243 U. S. 90 (cited in appellant's brief, pp. 35, 37 and 62), *Webster* v. *Reid*, 52 U. S. 437 (cited in appellant's brief, pp. 35, 62, 64 and 65), *Wuchter* v. *Pizzutti*, 276 U. S. 13 (cited in appellant's brief, pp. 35, 36, 37, 42, 62 and 63), *Commonwealth Company* v. *Bradford*, 297 U. S. 613 (cited in appellant's brief, pp. 60 and 61) and *Riley* v. *New York Trust Company*, 315 U. S. 343 (cited in appellant's brief, p. 74) also involved proceedings *in personam*. *Estin* v. *Estin*, 334 U. S. 541 (referred to in appellant's brief on pp. 26, 36, 59 and 61) involved the much vexed problem of matrimonial rights, the precise question being whether a valid Nevada divorce terminated the wife's right to support under a prior New York separation decree. All justices concurred in the finding that the Nevada court, having jurisdiction of the marital *res* through the bona fide domicile of the husband, had jurisdiction to dissolve the marriage without personal service in Nevada.

The first case cited in appellant's brief respecting notice (p. 35) is *Hassall* v. *Wilcox*, 130 U. S. 493. Here the holder of a note secured by a laborer's lien upon railroad property obtained judgment of sale by exercise of the right to confess judgment conferred upon him by the note without any notice whatever to other lienors or anyone else. The court held the judgment not binding upon a prior mortgage bond holder upon the express ground that the proceeding could not "be sustained as one *in rem*. * * * there should at least be constructive notice, by some form of publication or advertisement * * *" (p. 504).

In *Priest* v. *Las Vegas*, 232 U. S. 604, the second case cited on the subject of notice (appellant's brief, pp. 35, 46 and 47), a proceeding to quiet title instituted by publication against "unknown" claimants was held defective because, to quote the opinion of the Supreme Court, the statute explicitly required "the parties * * * to be designated 'by their names as near as they can be ascertained' and permits parties defendant to be designated as unknown claimants only when their names cannot be ascertained" and it was clearly demonstrated that claimants designated as "unknown" were in fact actually known (p. 615), i. e.—"the designation was untrue" and the statutory provisions themselves were not complied with (p. 616). The decision in *Windsor* v. *McVeigh*, 93 U. S. 274 (appellant's brief, p. 35), was based upon the improper striking out of a claimant's notice of appearance, the court not questioning the adequacy of notice by publication and posting in a confiscation case (p. 278). *Grannis* v. *Ordean*, 234 U. S. 385, relied upon by appellant (brief, pp. 35, 37, 38, 48 and 79), involved the doctrine of "misnomer" of a party, there being otherwise no question as to the sufficiency of notice given

by "publication, mailing or otherwise" in an action *in rem* (p. 393).

Appellant (brief, p. 44) appears to attach additional significance to the fact that the present statute itself specifies the method of giving notice instead of leaving this to the discretion of the court, cites the provisions of the Uniform Common Trust Fund Act (72, 107), which contains the latter type of provision, and refers to the practice in other states (pp. 67-68). But, as pointed out by the Surrogate, "The question before the court * * * is not whether the Legislature should as a matter of grace have required" additional notice "but whether the form and kind of notice prescribed by the Legislature are sufficient under all the circumstances to satisfy the requirements of the Federal and State Constitutions" (R. 118). Assuredly, the fact that the legislature does only what the court would itself, in the exercise of its discretion, have been justified in doing does not invalidate the legislature's act. On the contrary, as indicated from the decisions and the excerpts quoted from the opinions in the cases discussed on pages 19 to 30 above, the shoe is on the other foot and, in consonance with general principles, every doubt should be resolved in favor of the legislation and this Court has been hesitant to substitute its judgment for that of the state legislature on a matter of local experience and policy. The practice in those states which make no provision for an accounting respecting a common fund, apart from the accounting in the separate trusts, obviously has no relevancy to the present case.

(b) The statutory notice is not only "reasonable", but goes far beyond such notice as posting on the court house door or the like, confirmed, as shown above, by familiar practice and precedent as sufficient in such related proceedings *in rem* as proof of wills, accountings and distributions in decedents' estates.

The notice of accountings, prescribed by statute in the present case is manifestly reasonable and adequate judged in the light of the constitutional principles enunciated in the cases discussed above and contrasted with the form of notice upheld in such cases. Taking but a few of the cases, it has been seen as to an interest in land (see *Christianson* v. *King County*, *supra*, p. 24), an interest in chattels (see *Campbell* v. *Evans*, *supra*, p. 24), an interest as joint tenant or otherwise in a bank deposit (see *Security Savings Bank* v. *California*, *supra*, p. 25), an interest as stockholder of an insolvent bank (see *Matter of Empire City Bank*, *supra*, p. 27), an interest as heir, next of kin or legatee in a decedent's estate (see *Matter of Horton*, and cases cited therein, *supra*, pp. 21-22) that a person may be barred and foreclosed completely and forever from any such interest upon the basis merely of a notice posted or published in some distant state, or, in cases relating to decedents' estates, without any notice whatever, and this is so even though (a) there was not, as here, prior notification of persons having the same or a related interest (see for example, *Matter of Horton*, *supra*, p. 21, and *Campbell* v. *Evans*, *supra*, p. 24); (b) the person never knew of his interest by reason of ignorance of facts, distance, infancy, incompetency or other cause (*Matter of Horton*, *supra*, p. 21, *Campbell* v. *Evans*, *supra*, p. 24); (c) even though his name, address and interest may have been known to the plaintiff (*Matter of Horton*, *supra*, p. 21);

(d) even though no official supervision or legislative safeguards respecting the interest are provided (*Henricksen* v. *Baker-Boyer National Bank, supra,* p. 22, *Campbell* v. *Evans, supra,* p. 24); and (e) even though no representative was appointed to protect his interests in absentia (*Henricksen* v. *Baker-Boyer National Bank, supra,* p. 22, *Campbell* v. *Evans, supra,* p. 24). Assuredly in these circumstances the notice in the present case is sufficient where, not the interest itself but merely questions relating to the administration thereof, at most, are barred and (a) where elaborate statutory provision is made, by notice of first investment and copies of the annual audit, to assure actual knowledge of the interest on the part of at least the representative persons who are most immediately affected and to whom all others interested are ordinarily related; (b) where there are large numbers of persons, many of whose names and addresses are unknown and cannot be ascertained without delay and expense destructive of the purposes of the beneficial statute; (c) where official supervision and other safeguards are provided in the administration of the fund; and (d) where the interests of absentees are protected by "competent and responsible" guardians and attorneys appointed by the court and accountable to the court and to their wards for the diligent and proper protection of their wards' interests.

Appellant insists at some length (brief, pp. 53-58) that the notice provided for at the time of the first investment and the annual notice of audit required by the regulations of the Banking Board (pp. 6-7 above), preceding as they do, the institution of the proceeding, cannot constitute process or a substitute therefor. We make no such contention. How-

ever, these prior notices, disclosing not only the existence of the interest affected, but also, in the case of the notice of the first investment, the full statutory provisions regarding the manner, place, time and method of notice of the hearing, form a significant background in which the sufficiency of the later process is to be judged, particularly in the light of the numerous cases cited above, where similar or less notice was upheld in the absence of any such prior notice.

A further contention appears to be implicit in appellant's argument, viz.: that there exists a distinction between the constitutional rights of the current income beneficiaries and the other beneficiaries whose names and addresses are also known or ascertainable, so that notice, in addition to publication, is constitutionally required in the case of the former although it may be dispensed with in the case of the latter (brief, pp. 76-77). Thus, appellant repeatedly refers to the relatively small number of current income beneficiaries and the fact that their identity is known to the trustee (brief, pp. 40-41, 43, 76-77, 82), without adverting to the vastly greater group of secondary income beneficiaries and remaindermen. It is submitted that any such distinction is clearly without merit. It involves a confusion between constitutional requirements and what appellant, contrary to the legislature, believes proper and practicable in the circumstances. This is to say nothing of the dubious merit of a contention which would discriminate in favor of the very group which, due to receipt of the notice of first investment and copies of the annual audit, is, of necessity, already aware of its interest in the common fund and in the best position to know and protect its rights.

Appellant cites no authority, and we confidently believe that there is no principle or authority, which would justify a distinction between the constitutional rights of current income beneficiaries and the constitutional rights of beneficiaries having future rights in income or vested or contingent rights in principal regarding notice of proceedings affecting their rights with respect to the identical property or fund. It is believed to be self-evident that if mailing or other additional notice to current income beneficiaries were constitutionally required, then a like requirement would exist with respect to all other beneficiaries, if their names and addresses were known or could be ascertained with due diligence.

The tenor of appellant's brief throughout is to face only a fraction of the real and practical problem. Thus, he emphasizes the estimated 113 present current income beneficiaries (brief, pp. 40-41) and the estimated 315 beneficiaries entitled, up to the time of trial, to notice of the first investment (brief, pp. 40-77) in this, as yet, relatively new and small, but growing, fund (*supra*, p. 8). He minimizes the tremendously larger group of secondary income beneficiaries and contingent remaindermen whose real and ultimate interests may vastly transcend in value and extent those of the current income beneficiaries and whose number is unknown in the present case, but is estimated as up to 5,000 in The Bank of New York fund, itself still a relatively small fund (*supra*, p. 9). He acknowledges the "genuine benefits" (brief, p. 72) of the legislation and proclaims that a common fund may well become the "chief vehicle" for investment of small trusts (brief, p. 11), but fails to advert to the results of his contention in the case of even a moderately large fund. He suggests that if

the number of beneficiaries renders additional notice impractical, the solution is the creation of multiple small common funds (brief, pp. 40-41). He overlooks the fact that the problem of giving triennial notice to the same number of beneficiaries remains just as great if they share in multiple small funds as if they share in a single large fund, but with the loss of economy incident to the administration of a consolidated fund and a single court proceeding. He emphasizes the fact that the trustee has knowledge of the names and addresses of those entitled to notice at the time of the first investment (brief, p. 41). He ignores the fact that, unknown to the trustee, the interests of the presumptive remaindermen frequently terminate by death or otherwise or their addresses frequently change prior to the accounting proceeding, so that such knowledge would be of little, if any, assistance in the giving of notice of the proceeding (*supra*, pp. 8-10). He fails to mention the fact that there are continual and widespread changes, unknown to the trustee, in the classes constituting secondary life beneficiaries and remaindermen of the participating trusts, so that, if the participating trusts are of any substantial number, any reliable ascertainment of the names and addresses of the beneficiaries at the time of each triennial accounting would not only impose prohibitive delays and expense, but would be a virtual impossibility (*supra*, pp. 8-10).

Referring again to the decisions (*supra*, pp. 21-24), relating to decedents' wills and estates, appellant, as shown above (p. 30), at direct variance with Mr. Justice Holmes and the rationale expressed in the opinions themselves, endeavors to dismiss them merely with the comment that "Decisions relating to

descent and distribution of the estate of a decedent are *sui generis* since there is no federal constitutional guaranty * * * of succession to property of a decedent * * *. Hence they are not apposite to * * * *inter vivos* trusts * * *" (appellant's brief, p. 85). But such a "distribution" is almost universally accompanied by or an incident to an accounting and, as pointed out in the opinion below (R. 112), such was true in the cases cited (*Goodrich* v. *Ferris, supra; Christianson* v. *King County, supra,* and see *Roseman* v. *Fidelity & Deposit Co. of Md.*, 154 Misc. (N. Y.) 320). The case of *Henrickson* v. *Baker-Boyer National Bank* (*supra,* p. 22) involved the construction of a testamentary trust.

Of the 113 participating trusts in the instant fund, 57 are testamentary and were so described in the petition and citation in this case (R. 106). Assuredly, the decisions dispensing with notice entirely or requiring at most no more than posting or publication in accounting and construction proceedings relating to estates and testamentary trusts are a direct and clearcut precedent for this proceeding so far as it concerns the testamentary trusts.

Nor does there appear in principle or in practice any basis for discrimination between notice as required in the case of testamentary trusts and in the case of *inter vivos* trusts, at least where, as here, all trusts of both kinds are governed by the laws of this state. Indeed, the New York legislature, in addition to its unmistakable statutory provision to this effect in Section 100-c, has exhibited a clear and definite policy and intention to place the procedure for settlement of accounts of *inter vivos* trustees on a parity with that applicable in the case of testamentary trustees as evidenced by its enactment of Article 79 of

the Civil Practice Act (Ch. 611, L. 1943), outmoding the more cumbersome procedure, which formerly prevailed in the Supreme Court in the case of *inter vivos* trusts, and patterning the practice on that existing in the Surrogate's Court. In fact, even in the procedure relating to a single *inter vivos* trust, unattended by the practical difficulties presented in the case of a common fund, the legislature has liberalized the procedure and, in lieu of the combination of publication and mailing required as a substitute for personal service in the Surrogate's Court, has left the manner of notice to non-residents to the discretion of the Supreme Court. It has recently been held that under this chapter mailing alone and without publication will suffice (*Matter of Cobb*, New York Law Journal, Dec. 13, 1946, p. 1725 (not officially reported); affd. without opinion 272 App. Div. 793).

Certainly the principles and practice applicable to accountings respecting testamentary trusts are more closely analogous to those applicable to accountings respecting *inter vivos* trusts than to those applicable to the determination of the rights of owners of an unclaimed bank deposit or the liability to assessment of a stockholder of an insolvent bank. Yet the courts found no difficulty in applying to proceedings "*in rem*" or "*quasi in rem*" respecting these latter *inter vivos* transactions the same rules as were applied in the case of similar proceedings relating to decedents' estates (See *Security Savings Bank v. California*, *supra*, p. 25; *Matter of Empire City Bank*, *supra*, p. 27). It is, therefore, submitted that the cases respecting notice in the case of testamentary accountings are likewise clear-cut precedents for the sufficiency of the statutory notice in the case of the

participating *inter vivos*, as well as the testamentary, trusts.

In brief, the question is whether this Court should override the judgment of the New York legislature and courts on a matter of local experience and policy and defeat the purposes of a useful act in a sphere where precedent permits the legislature even wider latitude than it has exercised in the case of this statute.

CONCLUSION.

The statutory notice of accountings for common trust funds fully complies with the requirements of "due process of law" and, therefore, the decision appealed from should be affirmed.

Respectfully submitted,

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